

CHAPTER 3

SERVICE CONTRACT ADMINISTRATION

Introduction	The purpose of this unit of instruction is to familiarize the student with the most common aspects of service contracting that would confront a COR/QAE in the course of their duties.
Definition of “Service”	Webster’s New Collegiate Dictionary has a definition of <i>service</i> that fits in our context - “useful labor that does not produce a tangible commodity.”
Examples	Service contracts include, but not limited to, maintenance, overhaul, repair, housekeeping, grounds maintenance, food service, software development, Commercial Activities management, communications, audio-visual services, research and development, transportation services, advisory and assistance services and architect-engineering services.
The Commercial Activities Program	The Commercial Activities (CA) Program is driven by the need to pursue the most economic and efficient method of providing services to the Government’s customers. The CA Program was established by OMB Circular A-76. Often the Government finds itself in competition with private contractors when it may be more economical to rely on the commercial sector to provide the supplies and services. The contracting process is used to perform the cost comparison study to determine whether the Government or a private contractor will manage the commercial activity that is being studied.
Inherently Governmental function	<p>Some activities of the Government are considered inherently Governmental functions and these activities are not to be turned over to contractors. The Office of Federal Procurement Policy (OFPP) has a letter (91-2) defining what is considered inherently governmental in nature.</p> <p>These functions can be categorized as</p> <ul style="list-style-type: none">♦ Anything dealing with the act of governing - such as criminal investigations, judicial functions, management of Government programs, direction of the armed services, conduct of foreign relations, regulation of industry practices (food and drug administration), etc.

- ◆ Monetary transactions and entitlements - such as tax collection, revenue disbursements, obligating the Government, and control of treasury
-

Government will retain

Even if a study under OMB Circular A-76 shows that the activity could be privatized the Government will retain the performance when:

- There is no commercial source
 - National defense is the issue
 - Patient care, if determined in the best interest of the patients
 - The Government is less expensive
-

Cost comparison studies

Determining the less expensive route is done through a cost comparison study between commercial sources and the Government

Three documents are required on which to base cost:

1. Performance work statement to list the tasks to be performed for the activity
 2. Management study to establish most efficient organization (MEO) standards
 3. In-house cost estimate (the Government's bid)
-

Procedures

The Contracting Officer reviews the Performance Work Statement (PWS) to ensure that it is adequate and appropriate to serve as a basis for award.

The Government establishes a Source Selection Authority (SSA) who reviews the contract and identifies that offer which represents the best overall value to the Government. This contract offer competes with the Government's in-house cost estimate. There is a public review period of at least 15 working days. Congress may be involved in approving the conversion if the decision is to contract out.

Personal versus Non-Personal Services

Two types Services can be divided into (1) personal services and (2) non-personal services. The general rule is that the Government acquires non-personal services and would violate various statutes and Civil Service regulations if it used the contracting process for employment purposes.

Personal Service Contracts Definition The FAR defines *personal service contract* as “a contract that, by its express terms, or as administered, makes the contractor personnel appear, in effect, Government employees.”

Authority to use The Department of Defense has been authorized the use of personal services in the following specific instances:

- To employ court reporters or interpreters (10 U.S.C. 828)
- To hire counsel to represent individuals who fall under the Uniform Code of Military Justice or persons who are employed or accompany the armed forces outside the United States before foreign tribunals and administrative agencies (10 U.S.C. 1037)
- To carry out health care responsibilities in medical treatment facilities of DoD (10 U.S.C. 1091)

Even when the statutory authority can be cited, the FAR requires that legal counsel review and give an opinion on the legality of using it.

Checklist for personal services It may be a personal service if:

- Contractor employee performs on Government site
- Contractor employee uses tools and equipment provided by Government
- Contractor effort is applied directly to the organization’s function or mission
- Service lasts more than a year

The presence of one or more of the above does not automatically make a contract personal services but if the services require direct supervision by Government personnel it is a personal services contract.

**Non-Personal
Service Contracts
Definition**

The FAR defines a *non-personal service contract* as “a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration to the supervision and control usually prevailing in Government-employee relationships.”

Administration

Only the contractor or their agent in a non-personal service contract can manage or supervise contractor employees. Therefore, no Government official should be maintaining contractor personnel records such as time cards, or approving leave for contractor personnel, or developing duty rosters including names of contractor personnel. It should be noted that the COR/QAE might review these items to determine proper performance by the contractor.

**Impact of
performance
work statement**

The contract itself can at times be faulted for creating a personal service contract. In a non-personal service contract, Section C should not stipulate employee duty hours, require contractor employees to report to Government personnel, or require contractor employees to submit forms to the Government. Most of these requirements can be rephrased if the contract is truly non-personal.

Examples

A non-personal service contract may state that the contractor has access to the building during the hours from 8 AM to 4:30 PM Monday through Friday exclusive of Federal holidays. This allows the contractor to develop a duty schedule to fit within those times.

A non-personal service contract could arrange for task orders to be issued by the contracting officer. Then the contractor can match the qualifications of his employees to the specific task rather than stating “contractor employee shall report to a (named) Government employee” for tasking.

The Government may acquire a contractor’s employee work schedule as a data item listed in the Contract Data Requirements List (CDRL) rather than giving the impression that contractor employees must justify to a Government employee their absence from the job. Even in this example, it is hard to defend why the Government would be willing to pay for such information but there may be an impact on Government workload.

Service Contract Act

Secretary of Labor

The Service Contract Act places the responsibility for administration and enforcement with the Secretary of Labor.

Application

The Service Contract Act applies to all service contracts and subcontracts performed in the United States with an estimated value in excess of \$2500.

It does not apply to construction, supplies, transportation contracts where tariff rates apply, services that fall under the Communications Act of 1934, public utilities, maintenance and repair of information technology equipment, or contracts for operating postal stations for the U.S. Postal Service.

The act covers all employees working on a subject contract except for bona fide executive, administrative, or professional personnel.

Wage Determinations

A contracting officer contemplating a service contract in excess of \$2500 must request a wage determination from the Department of Labor. There are two types of wage determinations - 1) prevailing rates and 2) Collective Bargaining Agreement.

The determination will list the minimum wages and benefits to be paid to the categories of service employees listed. This wage determination is based on the prevailing rates in the geographic area of contract performance and becomes a contract requirement. If a classification of a service employee is not listed in the wage determination, but that individual is performing on the subject contract, the contractor must comply with the Fair Labor Standards Act (national minimum wage).

If the incumbent contractor has a Collective Bargaining Agreement (CBA) with an employee union, the CBA becomes the wage determination if the contract is awarded to that contractor or if an option is exercised. The CBA automatically becomes the wage determination unless determined not to have been reached at arms-length negotiations or the new wage rates are in substantial variance with the locality.

Wage determinations are valid for the period stated in the specific determination, usually a year.

Service Contract Act *Continued*

Successor contracting doctrine	The successor contracting doctrine (wages and benefits can be no lower than the previous CBA) will prevail even if the contract is awarded to a business which has no collective bargaining agreement.
Service contract price adjustment clause	On multi-year and option year contracts, the contractor is required to base their price for the option years of the contract on the current wage determination. If during the contract life the wage determination is increased, the Government must compensate the contractor for any increase in wage rates and labor overhead (FICA, Workman's Compensation, etc.) but no other type of overhead or profit. If a Cost Plus-Award Fee (CPAF) type of contract is used, the profit is determined by a profit pool made up of a base (as low as zero) and award fee (NTE 10%). Law to five years limits the terms of the contract if the Service Contract Act applies.
Enforcement	<p>The Secretary of Labor is solely responsible for the enforcement of the Service Contract Act. Unlike other labor statutes, the Contracting Officer or his representatives do not get involved in ensuring that the requirements of the Act are met.</p> <p>If a problem surfaces regarding labor rates or pay, it should be referred to the Contracting Officer who will inform the Agency Labor Advisory or the local Wage and Hour Division of DOL.</p> <p>One of the contract requirements is that a poster (supplied by DOL), detailing the rights of the employees, the wage determination, and the office that receives reports of violations or complaints, be placed in a conspicuous area available to the employees.</p> <p>Department of Labor can perform labor compliance checks, review contractors' records and direct certain administrative actions against contractors who breach this contract requirement. Several of these actions include:</p> <ul style="list-style-type: none">• Withholding funds for back pay from the contract in which the breach occurred• Withholding funds for back pay from any other contract(s) the contractor has with the Federal Government• Debarring from bidding on or being awarded future contracts• Terminating the contract

Summary

A service contract is one in which a contractor performs a task and does not supply a finished product.

The Commercial Activities Program is used to determine the best method of managing certain activities that are operated in the Federal Government. The policy for making these determinations is found in OMB Circular A-76 that uses the contracting process to accomplish this task.

The two types of service contracts are personal and non-personal. Personal service contracts are ones in which the Government performs supervision over the contractor's personnel. Personal service contracts cannot be awarded unless authorized by law. On a non-personal service contract, the Government has no control or supervision over contractor personnel.

The Service Contract Act of 1965 applies to personnel who are employed on a service contract with a value in excess of \$2500. Contractors are required to pay the wages established on the wage determinations. There are two types of wage determinations under the Service Contract Act - Prevailing Rate and Collective Bargaining Agreements. The Service Contract Act places the responsibility for administration and enforcement with the Secretary of Labor.
